United States Court of Appeals

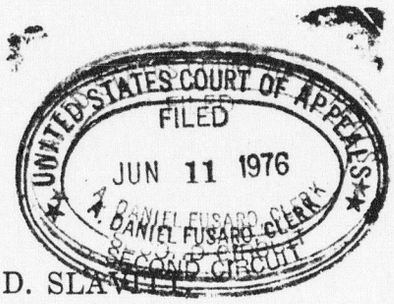
for the Second Circuit

BRIEF FOR APPELLANT

76-6060

United States Court of Appeals

FOR THE SECOND CIRCUIT



Docket No. 76-6060

CONNECTICUT NATIONAL BANK, A. D. SLAVITT
and CHARLES SALESKY, Executors
of the Will of
FRANK H. JAMES, Deceased,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPELLANT'S BRIEF

FRANK W. MURPHY,
Slavitt, Connery & Vardamis,
618 West Avenue,
Norwalk, Connecticut, 06852.

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No. 76-6060

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v.

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BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

This is an action brought by the Executors of the Will of Frank H. James, pursuant to 28 U.S.C. 1346 (a) (1), for a refund of federal estate taxes paid by reason of the disallowance of certain deductions by the Government. The parties filed cross motions for summary judgment. Oral arguments on the motions were heard by the Honorable Arthur H. Latimer, United States Magistrate, on December 9, 1974. The written memorandum of decision was filed by Magistrate Latimer, endorsed by the Honorable John O. Newman, United States District Judge on March 1, 1976, and judgment rendered thereon on March 3, 1976. By virtue of said judgment, the District Court upheld the partial disallowance of a charitable deduction claimed for the remainder of a testamentary trust, and the disallowance of a marital deduction based upon the widow's allowance ordered by a Connecticut Probate Court. The Executors filed a timely notice of appeal. The decision of the District Court is not yet reported.

STATUTES INVOLVED

The applicable statutory and regulatory provisions arise under 26 U.S.C. 2055 concerning charitable deductions, and 26 U.S.C. 2056 concerning the marital deduction. The text of the statutes and regulations are found in the text of the Brief where the language is applicable. In addition, the interpretation of Section 45-250 of the Connecticut General Statutes is important, together with the legislative history of that Section. For convenience, Section 45-250 and its legislative

history are set forth in an Addendum to this Brief (pp. 37 - 40).

STATEMENT OF THE ISSUES PRESENTED

1. Does the Testator's Will set forth an ascertainable standard for invasion of a charitable remainder for the benefit of life tenants?

2. Is the possibility of invasion of the remainder so remote as to be negligible, thereby making the entire charitable remainder deductible?

3. Does the widow's allowance, as provided under Connecticut law and ordered in this instance qualify for a marital deduction?

STATEMENT OF FACTS

The Testator, Frank H. James died a resident of Norwalk, Connecticut, on September 13, 1969, leaving a Last Will and Testament, which was duly admitted to Probate, and

the Plaintiffs were appointed Executors. After provision for certain specific bequests, the Will in Article 5 directs that the entire remainder of the estate, which represented the bulk of the estate, be held in trust. (Appendix VII, 26a 27a - 31a). The trust is divided into two separate shares, one for the benefit of the Testator's wife, Ada B. James (75%), and one for the benefit of the Testator's brother, William R. James (25%). Although the trust provides for the accumulation of income from the trust, it permits the trustees to either distribute the income to the beneficiaries during their lifetime, or pass the remaining balance of the net income not distributed to the principal of the trust. Upon the death of Ada B. James and William R. James, the entire remainder will be distributed among eight different charities. (Appendix VII, 26a, 30a).

In addition to the power to distribute or accumulate the income, the trustees are authorized to invade principal to a limited extent. Trustees are permitted to invade the principal of the trust for an annual sum of $7,500.00 per year, to or for the benefit of Ada B. James, with a maximum lifetime invasion of $75,000.00. (Appendix VII, 29a).

Similarly, the power to invade for the benefit of William R. James is limited to an annual maximum of $2,500.00, and a lifetime maximum of $25,000.00. In granting the discretion to the trustees, the trustees are permitted to "pay over or apply the principal of any of the shares to or for the benefit of the respective life income beneficiaries. . . ". However, the power of the trustees to invade the principal for the benefit of the life income

beneficiaries, is limited to an amount of $10,000.00 in any one year, in excess of income, and an overall aggregate of $100,000.00. (Appendix VII, 29a).

The Executors, in filing the Federal Estate Tax Return, claimed a charitable deduction of the remainder of the trust in the amount of $398,276.05. Based upon the limited power of invasion set forth above, the claimed charitable deduction was disallowed to the extent of $79,124.87, and allowed as to the remainder. The Executors objected to the disallowance of the charitable deduction in part by the government because the Will establishes an objective and limited standard for invasion, and therefore, the question of the liklihood of invasion for the remainder for the benefit of the life income beneficiaries, and to the detriment of the charities, should be examined.

There is no real possibility of invasion of the charitable remainder for the benefit of the income beneficiaries. William A. Nothnagle, Jr. is the Trust Officer of the Connecticut National Bank, and is in charge of the administration of the trust fund and the funds of the estate of Frank H. James. As set forth in his affidavit, (Appendix VII 17a,19a,21a), Ada B. James is an elderly woman with limited expenses, substantial personal assets, and has never expended all of the income of the trust. A similar situation exists with regard to William R. James.

As a result of additions to the trust from accumulated income, the portion of the trust attributable to share of Mrs. James increased from its initial funding level of approximately $285,000.00, to approximately $465,000.00 as of the date of Mr. Nothnagle's affidavit (Appendix 17a, 19a, 24a). Similarly, the share of the trust attributable to William R. James was initially funded at $95,000.00, and as of the date of Mr. Nothnagle's affidavit, was approximately $155,000.00 (Appendix 22a, 25a). Based upon these facts, the Executors have asserted that there is no liklihood of any invasion of the corpus of the trust, and that the entire corpus, together with additional accumulated income, will remain upon the death of the lifetime beneficiaries for the benefit of the charitable institutions.

The second issue in the case involves a marital deduction which was disallowed to the extent of $30,000.00. The Testator was survived by his widow, Ada B. James. By order of the Norwalk Probate Court, dated December 29, 1969, the widow's allowance of $2,500.00 per month for twelve (12) months was ordered pursuant to Section 45-250 of the Connecticut General Statutes. (Appendix IX, 40a). The Probate Court Order provides as follows:

> "The sum of TWO THOUSAND FIVE HUNDRED ($2,500) DOLLARS per month from the date of death of said deceased, be and the same is hereby allowed to the surviving spouse of said deceased, for her support out of said estate, and said allowance shall

> vest in said spouse, and shall not terminate with the subsequent death or remarriage of said spouse, and the Executors of the Will and Codicil thereto of said deceased are hereby directed to pay over the amount so allowed to said widow pursuant to this order." (Appendix IX, 40a).

The allowance of $30,000.00 was claimed as a marital deduction as a "interest in property . . . passed from the decedent to his surviving spouse", 26 U.S.C. Section 2056 (a). However, the government disallowed the deduction.

The District Court held that the disallowance of the deductions in both instances was proper, and the Executors have appealed. It is respectively submitted that the estate is entitled to both deductions for the reasons set forth below.

ARGUMENT

I. THE CHARITABLE DEDUCTION SHOULD BE ALLOWED:

A. THE TRUST PROVIDED BY THE TESTATOR'S WILL ESTABLISHES AN ASCERTAINABLE STANDARD OF INVASION.

As noted above, the Will establishes a trust which provides benefits for persons during their lives, and provides for distribution of the remainder to certain named charitable beneficiaries. The charitable deduction was allowed in part, and denied in part by the Government. The court below concluded that the partial disallowance of the charitable deduction "was correct because the Will's language establishes no objective standard to limit the power's full use, . . .". (Appendix X, 41a, 42a).

The Internal Revenue Code of 1954 (Section 2055 (a)), permits a deduction for the value of a remainder interest bequeathed in trust for charitable, religious, scientific, literary or educational purposes. There is no question that the eight charitable beneficiaries of the remainder interest of the estate of the Testator qualify under Section 2055 (a). However, where invasion of the trust corpus is permitted, deduction under the Treasury Regulations is allowable only to the extent that the remainder interest is presently ascertainable and separable from the noncharitable interest. Treasury Regulations, Section 20.2055-2(a). The questions to be decided here are based upon the law as it existed prior to the Tax Reform Act of 1969. (Pub. L. 91-172, 83 Stat. 487, 560-565; codified in Sections 642 (c) (5), 664, 2055 (e) of the Internal Revenue Code).

In view of the Trustees power to invade the trust corpus, there are two questions which must be answered. The first is whether the language of the Will has defined an objective, ascertainable standard controlling the Trustees' power to invade the corpus. If the first is answered in the affirmative, then the second question is whether the possibility of invasion is so remote as to be negligible. Ithica Trust Co. vs. United States, 279 U. S. 151 (1929). It is respectfully submitted that the decedent's Will defines an objective standard concerning the Trustees' power of invasion.

There are a number of cases which have considered the question of whether the charitable remainder interest is

"presently ascertainable". The basic test was summarized in Salisbury vs. United States, 377 F. 2d 700 (1967) as follows:

> "The answer must be in the affirmative when the power of the life tenant to invade corpus is limited by an objective standard fixed by the terms of the Will that is capable of being stated in terms of money. Ithica Trust Co. v. United States, 279 U.S. 151, 154, 49 S.Ct. 291, 73 L.Ed. 647 (1929). Absent a measurable standard limiting the power of invasion, the charitable deduction is disallowed, however remote or tenuous the possibility of invasion might be. Henslee v. Union Planters National Bank and Trust Co., 335 U.S. 595, 599, 69 S.Ct. 290, 93 L.Ed. 259 (1949); Berry vs. Kuhl, 174 F.2d 565, 567 (7 Cir. 1949)." (377 F.2d at 703).

The standards cannot be the subject of mere"speculation" but rather, must set forth purposes for which the corpus may be invaded with "reliable prediction". Salisbury v. United States, Supra at 704; See also: Merchants National Bank of Boston vs. CIR, 320 U.S. 256, 262 (1943). Under most Wills, there is some language which must be construed in order to determine whether or not presently ascertainable standard of invasion actually exists.

It was noted in a recent case:

> "The central inquiry in determining whether the language of split-interest trust creats a presently ascertainable charitable remainder interest, is whether the principal can be invaded only for purposes, the determinance of which are known or known to be remote." (Hartford National Bank and Trust Company vs. United States, 467 F.2d 782, 784,(1972)).

In that case, this Court found that the trustees' power of invasion was presently ascertainable with the power to invade the trust was "as it feels necessary for the physical welfare" of the income beneficiaries. (467 F.2d at 786). In the typical case, the taxpayer, the government, and the courts in construing the language of the trust must review certain words used in the trust in order to determine whether or not power to invade is presently ascertainable. The construction of such language is in most instances, very difficult.

By way of summary, language in the following cases was held to set forth a sufficiently specific standard: "support and maintenance" Berry vs. Kuhl, 174 F 2d 565 (1949); "accident, illness, support or maintenance"; Lincoln Rochester Trust Company vs. CIR, 181 F 2d 424 (1950); "proper care, support and maintenance"; Blodget vs. Delaney, 201 F 2d 589 (1953); "comfort and welfare"; Nardi vs. U.S. 385 F 2d 343 (1967); "accident, sickness, or other emergency or unusual condition of any kind"; Salisbury vs. U.S., supra. On the other hand, language in the following cases has been found to be not fixed and measurable: "happiness"; Merchants National Bank vs. CIR, supra; "desire"; Gammons vs. Hassett, 121 F 2d 229 (1941); "comfort and pleasure", Industrial Trust Co. vs. CIR, 151 F 2d 592 (1945); " any reasonable requirement", State Street Bank and Trust Co. vs. U.S., 313 F 2d 29, (1963). The above cases are not an exhaustive list of the language which has been determined as qualifying as providing a fixed and ascertainable standard of invasion. However, they

are cited for the purpose of giving a representative sample of the language of various cases.

However, in this case, we do not have to face the difficult problem of construction of language of the Will in order to determine whether or not the standard of invasion is presently ascertainable. In the first place, the Will sets specific limitations on the right of the trustees to invade the corpus of the trust for the benefit of the lifetime beneficiaries. Power of invasion of the corpus of the trust is limited to the sum of $7,500.00 per year, to or for the benefit of Ada B. James, with a maximum lifetime invasion of $75,000.00, and similarly limits the power to invade for the benefit of William R. James to an annual maximum of $2,500.00, and a lifetime power to invade of $25,000.00. Thus, there is a ceiling on the trustees' power to invade. The government, in allowing the deduction in part, has recognized this ascertainable standard.

There can be no standard of invasion which is more ascertainable than a fixed dollar limitation.

In Bowers vs. South Carolina National Bank of Greenville, 228 F 2d 4, the Will provided for payment of $150.00 per month to each of the decedent's two sisters for life, and $25.00 per month to his cousin, until the death of the survivor of the sisters, and granted the trustees the power to use the corpus of the trust for certain purposes, including necessary hospital

and medical expenses in case of illness of the sisters, if the income should prove insufficient. The court held that an ascertainable standard was set forth by the Will, because of a fixed dollar amount. Similarly, in the case of In Re Estate of Judge, 371 F Supp.716, the Court concluded that a power to invade the corpus to the extent that trust income is insufficient to pay the life tenant $500.00 per month, constituted an ascertainable standard. For other reasons, the deduction was disallowed in that case. However, in both of these cases, there was neither an annual maximum nor a lifetime maximum as to the invasion of the corpus.

Consideration should also be given to the case of Schildkraut vs. CIR, 368 F2d 40 (1966). This case is interesting not only for its applicability to this case, but because this Court did not permit the Internal Revenue Service to "whipsaw" a taxpayer by denying both the charitable deduction and a marital deduction, in a situation where the beneficiary had to be either the widow or the charitable foundation. Aside from this point, the facts of this case are particularly significant. Decedent created a $300,000.00 trust from which the surviving widow was to be paid $12,000.00 per year, and the trust was to pay Federal and State income taxes, real estate taxes in Florida as long as she continued to own certain Florida property, and upon her death, principal was to go to a charitable foundation. The court applied,in effect, a dual test. It concluded that the interest of the charitable foundation was "presently ascertainable" and it concluded that there was reasonable assurance that the

charitable foundation would receive the principal of the trust. The court stated:

> "A dual strain runs through them: a charitable deduction will be denied where the expectancy of the charity can be controlled or substantially affected by the volitional act of the life tenant or where a standard for invasion that might diminish the corpus going to a charity is not objectively fixed." (368 F 2d at 47).

The Court went on to say:

> "For reasons already made plain, there is no significant volitional power in Mrs. Schildkraut to defeat the Foundation's expectancy. Moreover, the standards for invasion here are 'fixed in fact and capable of being stated in definite terms of money'. There is nothing vague or subjective about a command to make up the difference between actual income and $12,000.00 a year, or to pay defined taxes." (368 F 2d at 47).

Similarly, in this case, there is nothing "vague or subjective" about a power of invasion which is limited by a specific dollar amount on an annual basis, by a specific dollar amount on lifetime basis, and by a requirement that the invasion be "to or for the benefit" of the lifetime beneficiary.

The government relies upon the broad language of the power to invade up to the maximum limits as a basis for denying deductibility. However, even that power is not unlimited for two reasons. The first is that the trustees in administering the trust are bound by language in the trust, and the key words of the Will must be interpreted in their context, and construed

as part of the dispositive scheme of the entire instrument. Salisbury vs. United States, supra at 706. In that case, the word "benefit" was interpreted in conjunction with other language in the Will, and not taken alone. Secondly, we must examine Connecticut Law, since the Connecticut Courts would ultimately determine the limits upon a power to invade the corpus. Lincoln Rochester Trust Co. vs. CIR, supra at 426.

It is clear that any one of the charities who feels that the trustees are abusing their discretion for the benefit of lifetime beneficiaries, have a right to petition the Connecticut Courts for relief under Connecticut law. As stated in Connecticut Bank and Trust Co. vs. Lyman, 148 Conn. 273, 170 A. 2d 130 (1961):

> "It is frequently held that even an apparently unlimited power of withdrawal or invasion is subject to an implied limitation that it be exercised in good faith and not for the dominant purpose of preventing the remainder from going to the remainder-men." (148 Conn. at 281).

Similarly, in that case, the Court pointed out that the mere presence of the remainder interest is a sufficient indication of an intention to "circumscribe an otherwise apparently unbridled power of invasion". (148 Conn. at 282).

In the construction of a testamentary trust, the intent of the Testator must control under Connecticut law. Connor vs. Hart, 157 Conn. 265, 275, 253 A 2d 9 (1968). Such intent is to be determined from reading the instrument as a

whole, in light of the circumstances concerning the Testator when the instrument is executed, including the condition of his estate, his relationship with his family and the potential beneficiaries, and the station and conditions of his family and beneficiaries. Connecticut Bank and Trust Company vs. Lyman, supra at 279; Gimbel vs. Bernard F. & Alva B. Gimbel Foundation, Inc. 166 Conn. 21, 26 (1974).

In addition, we must keep in mind that under Connecticut law, the trustees are not given dispositive powers. Accordingly, they cannot exercise their powers for the purpose of materially altering the value of the remainder interest, in order to favor or benefit the income beneficiaries. Connor vs. Hart, supra; Connecticut Bank and Trust Co. vs. Lyman, supra. This is the case even though broad language may be used in the Will concerning the discretion of the trustees. It is the clear and consistent policy under the Connecticut cases, to limit the right of invasion to preserve the estate for the benefit of the remaindermen, in the absence of clear and unequivocal language in the governing instrument showing that such limitations are not applicable. Hooker vs. Goodwin, 91 Conn. 463 at 467-468 (1917); Connor vs. Hart, supra; Connecticut Bank and Trust Co. vs. Lyman, supra. In Connor vs. Hart, the court pointed out that even the use of the term "sole discretion" will not be construed so as to remove a trustee from equitable control. (157 Conn. at 274). In addition, the court concluded that limitations on discretion will be applied "with perhaps even more rigor when,

as here, a charitable trust is involved." (157 Conn. at 274). A charitable trust, as found in this case, is to be construed as far as reasonably possible, so as to uphold it under Connecticut law, and so as to preserve it to the fullest extent possible for the benefit of the charitable remaindermen. Connor vs. Hart, supra. The Connecticut Courts recently had occasion to strongly reaffirm these principles in the following manner:

> "It certainly would constitute a violent and wholly unwarranted repudiation and reversal of heretofore settled Connecticut trust law to construe any or all of these administrative powers conferred on the trustees as powers which, separately or collectively, authorized the trustees to destroy or cripple a charitable bequest and turn the foundation's principal over in whole or in part, to the life beneficiary or, on the other hand, deprive the life beneficiary of the income from the principal of the trust during her life. "For the trustees so to do would be an impermissible and illegal abuse of discretion and would obviously be in violation of the settled rule that [w] hen there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.' Restatement (Second), 1 Trusts 183." Connor, supra, 276. (Gimbel vs. Gimbel Foundation, Inc., supra at 35).

Based upon the clear intention of Frank H. James to benefit the various charities set forth in his Will, there can be no serious question under Connecticut law that any Connecticut court would interpret power to invade for the benefit of the lifetime beneficiaries, most strictly against the lifetime beneficiaries, so as to preserve the charitable remainder as far as possible.

In examining the testamentary trust established by Frank H. James, it is clear that his overriding intention was to preserve as much as possible for the benefit of the charities which he selected. The Will is remarkable in its careful attention to the selection of the charities which will benefit. The Will clearly limits the power of invasion of the corpus on both an annual and lifetime basis. While it permits payment to the lifetime beneficiaries out of income, it also provides that payments must be to or for the "benefit" of the lifetime beneficiaries, and it gives the trustees the power to accumulate income and add it to the corpus of the trust. Moreover, in deciding whether there is an ascertainable standard, the Plaintiffs urged the Court to consider the Testator's knowledge of the circumstances of the lifetime beneficiaries, as well as the scheme that he selected in his Will. In view of the above, it is clear that we have a presently ascertainable standard, based upon the specific dollar limitations on the power to invade on an annual and lifetime basis. Therefore, the threshold test under Section 2055 of the Internal Revenue Code has been passed. Consequently, we should now consider whether or not the possibility of invasion is so remote as to be negligible. However, before doing so, it should be noted that the Court below relied solely on the case of City Trust Company vs. United States, 497 F 2d 718. It is respectfully submitted that this reliance is misplaced. There was no dollar limitation on the power to invade,

and the trustees' powers were based upon completely subjective factors such as provision for the widow's "happiness" for "whatever she may desire", and for certain payments "after the payment of all of her necessary expenses". In that case, the Court concluded "thus, the language in issue, read in its entirety, makes clear that the decedent intended his trustee to prefer his wife's desires at all times over the needs of the charitable remainder." 497 F 2d at 718. Quite the contrary is the case here. This Will clearly provides for a scheme to preserve the maximum estate for the benefit of the charitable beneficiaries.

Consequently, it is respectfully submitted that based upon the ascertainable standards in the Will, we **should** consider the question of whether or not the possibility of invasion of the corpus is so remote as to be negligible.

B. THERE IS NO REAL POSSIBILITY OF INVASION OF THE CHARITABLE REMAINDER FOR THE BENEFIT OF THE INCOME BENEFICIARIES.

Based upon the cases, it is clear that the question of the possibility of invasion, and the question of remoteness of the invasion are questions of fact which must be determined from all of the evidence. Salisbury vs. United States, supra; Hartford National Bank and Trust Company vs. United States, supra; Schildkraut vs. C.I.R., supra.

In considering the question of invasion, we must review knowledge of the beneficiaries' circumstances, as known by Frank H. James at the time of making his Will, and at the time of his

death. Connecticut Bank and Trust Co. vs. Lyman, supra; Salisbury vs. United States, supra. As pointed out in Mr. Nothnagle's Affidavit, (Appendix IV,19a,20a),at the time the Testator drew his Will, and at the time of his death, his wife, Ada B. James was confined to an institution, and had been institutionalized for some period of time. After his death, she was transferred to a convalescent home for regular nursing care. At the present time, she is 83 years of age, and has limited needs and a short life expectancy. Her total expenses do not even come close to approaching the income of the trust. In addition, she has substantial assets of her own. Thus, the Trustees have been able to accumulate income and add it to the principal of the trust.

A similar situation existed as of the time of the making of the Will, and at the time of the Testator's death, with regard to William R. James. He lives a quiet, reclusive life and has substantial assets in his own right. He has never received the total income generated from the trust, and that income has been added to the trust principal. (Appendix VI, 21a,22a).

The uncontroverted evidence shows that substantial sums have been accumulated from income and added to the trust. Moreover, there never has been any invasion of the trust corpus for the benefit of the lifetime beneficiaries. The Affidavit of William A. Nothnagle, Jr., Trust Officer of the Connecticut National Bank, is particularly informative. (AppendixVI,19a,25a). The Will provided for the establishment

of two trusts. The value of the Ada B. James Trust was approximately $465,000.00 as of September 12, 1974, (Appendix VI,21a). During the accounting period ending July 31, 1973, $14,802.81 was transferred from income to the principal to that trust. (Appendix VI,21a,25a). Similarly, the trust corpus of the William James Trust was approximately $155,000.00 as of September 12, 1974, and during the last counting period prior to that date, $1,253.14 had been transferred to the trust. (Appendix VI,22a). It is clear that substantial amounts have been accumulated from income and added to the trust corpus for the benefit of the charitable remainder.

Based upon all of the facts and circumstances of this case, it is clear that there is no prospect at all of an invasion of the trust corpus for the benefit of the lifetime beneficiaries. Thus, the entire amount will be available for distribution to the various charities named in the Will.

It is respectfully submitted that the Will establishes a clearly ascertainable standard for invasion of the trust principal, with severe limitations on the power to invade the trust principal. This is recognized by the District Director of Internal Revenue, in terms of his disallowance of only a small portion of the charitable remainder deduction. Similarly, the uncontroverted facts are that there is no present, immediate, or likely future invasion of the trust corpus so as to deprive

the charitable remaindermen of any of their interest. As a matter of fact, as a result of the accumulation of income, the charitable remaindermen will receive substantially more than they could have reasonably anticipated at the time of death of Frank H. James. Under these circumstances, it is respectfully submitted that the full charitable remainder is deductible under Section 2055 of the Internal Code, and should be allowed in full.

II. THE MARITAL DEDUCTION FOR THE WIDOW'S ALLOWANCE SHOULD BE PERMITTED.

The Connecticut Probate Courts are empowered by Section 45-250 of the Connecticut General Statutes to grant the surviving spouse or the family of the deceased "such amount as it may judge necessary" for their support during the settlement of the Estate. In this case, on December 29, 1969, the Probate Court for the District of Norwalk, granted a widow's allowance in favor of Ada B. James, and ordered that:

> "The sum of TWO THOUSAND FIVE HUNDRED ($2,500) DOLLARS per month for 12 months from the date of death of said deceased, be and the same is hereby allowed to the surviving spouse of said deceased, for her support out of said estate, and said allowance shall vest in said spouse and shall not terminate the subsequent death for remarriage of said spouse, and the Executors of the Will and Codicil thereto of said deceased, are hereby directed to pay over the amount so allowed to the widow pursuant to this order." (Appendix IX 40a).

The Executors claimed the amount of the widow's allowance as a marital deduction, as a "interest in property which . . . passed from the decedent to his surviving spouse", 26 U.S.C. Section 2056 (a). The Internal Revenue Service

disallowed this deduction on the ground that the widow's allowance constitutes a "terminable interest", which has been defined as an interest which will fail on the lapse of time, or on the occurrence or failure to occur of certain contingencies. 26 U.S.C. Section 2056 (b) (1); Treasury Regulations Section 20.2056 (b)-(1) (b). The District Court upheld the disallowance of this item, "because decedent's wife had no vested, indefeasible right to the award at the time of her husband's death." While it is conceded that there are certain discretionary acts which may be taken by the Probate Court, the surviving spouse has a vested right to an allowance under Connecticut law.

In determining whether or not the widow's allowance qualifies for the marital deduction, it is well established that the nature and character of the widow's allowance must be determined on the basis of Connecticut law. Bookwalter vs. Phelps, 325 F. 2d 186, 187 (1963). As noted above, a widow's allowance is permitted under Section 45-250 of the Connecticut General Statutes. (See Brief, Addendum A, p. 37). (See also: Section 46-12 Connecticut General Statutes). The Statute, Section 45-250 in its present form, is as a result of amendments to the Statute in 1961, 1963 and 1967, which amendments are set forth in Addendum B to this Brief (p. 38, 39). Prior to the recent amendments commencing in 1961, it was held that the widow's allowance under Connecticut law was not a vested right, and therefore, did not qualify for the marital deduction. Second National Bank of

New Haven vs. United States, 222 F. Supp. 446, (D. Conn. 1963), reversed on other issues, 351 F. 2d, 489 (1965) affirmed sub. nom. Commissioner vs. Bosch Estate, 387 U.S. 456 (1967). However, since that decision, there have been three significant amendments to the Connecticut Statute, as set forth in the Addendum to this Brief (p. 38-39).

In order to determine the nature of the widow's allowance under Connecticut law, it is necessary to not only examine Section 45-250 of the Connecticut General Statutes, but also to examine the legislative history of that Statute and the Common Law of the State. The amount of the allowance to the surviving spouse is to be determined by the Probate Court. (Section 45-250 (a)). In addition, the Court may fix the time for which the allowance is to run (Section 45-250 (b) (1); include a provision that the allowance is to be paid in a lump sum or periodically (Section 45-250 (b) (2)); and include a provision that the allowance be vested retroactively as of the moment of death of the spouse, and that it will not terminate either on the death or remarriage of the surviving spouse. (Section 45-250 (b) (3)). The District Court concluded that the widow's allowance Statute merely granted the widow a "vested right" to seek an allowance. It is respectfully submitted that the nature of the widow's allowance in Connecticut is much more than a right to seek an allowance, but is a vested right which is firmly rooted

in the law of this State.

In its origin, allowance was a continuation of the support legally owed by the deceased to his surviving wife and family. As stated by one commentator:

> "The allowance is intended, in the interest of humanity, to prevent what would in almost every case be an unseemly and unnecessary demand upon public charity. Therefore, to a limited extent, the use of the estate for the payment of the support of the family is paramount even to debts and does not depend on the certainty or probability that anything will eventually become distributable to the recipients of this support." (Wilhelm, Connecticut Estates Practice, at 167; See also, Baldwin v. Trandesmen's National Bank, 147 Conn. 656, 165A 2d 331 (1960)).

Although the Statute has a long history in Connecticut, dating back to 1825, it is clear that the widow's allowance is a well established part of the common law of this State. , Haven's Appeal, 69 Conn. 684, 38 A795 (1897); Baldwin vs. Tradesmen's National Bank, supra. Although the Probate Court is given certain discretion, that discretion is not an absolute discretion, but is a "legal discretion" which is reviewable by the Superior Court on a trial de novo. Baldwin v. Tradesmen's National Bank, supra. In addition, while the Probate Court may fix the amount, there are historical and legal guidelines concerning the method of fixing the amount of the allowance. As stated in Baldwin vs. Tradesmen's National Bank, supra:

> "While the Statute (Section 45-250) provides that the allowance should be made only in such amount as the probate court 'may judge necessary for the support for the surviving spouse or family of the deceased during the settlement of the estate,' the word 'necessary' is a relative term and does not restrict the allowance to bare subsistence. Rather, the Statute contemplates the award of such amount as may be necessary in addition to the other assets of the spouse, to maintain a household and manner of living appropriate to the decedent's station in life in view of the financial condition of his estate upon his death. (Citations omitted). Of course, an allowance cannot be granted for the purpose of enriching the widow at the expense of others entitled to the estate or of the rights of creditors in case of insolvency. But even the fact of insolvency is not, in, and of itself, a ground for denying an allowance if one is found to be necessary." (147 Conn. at 661-662).

There are very few Connecticut cases which have denied a widow's allowance, and in fact, the vast majority of the decisions have upheld the allowance. In Baldwin vs. Tradesmen's National Bank, supra, the Court noted only two circumstances under which widow's allowance could be denied. The first was when the allowance was for the sole purpose of enriching the widow to the detriment of those who had a legal interest in the Estate. (147 Conn. at 662). The second was when the purpose of the allowance was to defeat the right of creditors for an insolvent Estate. However, the Court pointed out that the mere fact of insolvency is not a ground for denying an allowance if one is found to be necessary. (147 Conn. at 662).

The following is a summary of the Connecticut cases which have denied the widow's allowances. It is interesting to note that the denial in each case was based upon a voluntary action by the surviving spouse prior to the death of the deceased. It has been held that a contract by a wife, for adequate consideration, relinquishing the right to an allowance is not a contract contrary to public policy. Staub's Appeal 66 Conn. 127, 33A 615 (1895); Cowles vs. Cowles, 74 Conn. 24, 49A 195 (1901). Technically, this is not a denial of a right to a statutory interest, but rather, a voluntary relinquishment of it. In Alexander vs. Alexander, 107 Conn. 101, 139A 685 (1927), the lower court decided that the right to an allowance would be barred by an abandonment of the deceased by the surviving spouse without sufficient cause, which abandonment continued to the date of death. However, the issue was not decided by the Supreme Court. A similar question was also raised in Williamson's Appeal, 123 Conn. 424, 196A 770 (1937), but not ultimately decided by the court. It has also been held that a divorced wife cannot claim a widow's allowance for herself, but she may claim an allowance for the support of the minor children of the marriage. Welch's Appeal, 43 Conn. 342 (1876). Finally, in Catalano vs. Catalano, 148 Conn. 288, 170A 2d 726 (1961) a widow's allowance was denied in a case where the marriage was found to be not valid in

Connecticut because it contravened the public policy of the state. Consequently, the court held that the Plaintiff was not a surviving spouse, and therefore, not qualified to receive support.

Connecticut courts have most recently had occasion to review widow's allowance and its nature in Sklar vs. Estate of Sklar, 168 Conn. , A 2d (XXXVI Connecticut Law Journal No. 37, Page 1, March 11, 1975). In that case, the Probate Court entered an order for a widow's allowance on a monthly basis for a period of 12 months from the husband's death. The cause of litigation was the provision in the decedent's Will which stated that the Will provisions for the benefit of the widow were "in lieu of all statutory rights to which she would otherwise be entitled in my Estate, including her right to any statutory widow's allowance.". The Court reviewed in detail the nature of the widow's allowance under Connecticut law, and reaffirmed the earlier decisions on the allowance. The Court stated:

> "On the other hand, it is a long established policy of the state now codified by statute that a Probate Court may grant an allowance for the support of a surviving spouse pending settlement of the estate and it is recognized that such an allowance 'is not a property right, nor in any sense an allowance of a share from the estate, nor an apportionment to her from the estate'; Baker's Appeal, supra, 588; and that the award by order of the Probate Court 'is a discretionary act, having no reference to or effect upon any provision of the Will, nor upon the right of any heir or legatee' but ' a matter wholly for the probate court to determine. . . . ' Lawrence vs. Security Co., 56 Conn. 423, 443, 15 A. 406. it is akin to the same public policy which requires a husband or wife to furnish support to a spouse regardless of personal wish or choice. See General Statutes 17-320, 17-321 and 46-10." (Supra at Page 4).

The Court went on to determine that the widow's allowance was permissable even though contrary to the provisions set forth in the decedent's Will:

> "We conclude that the public policy expressed in the latter portion of Section 46-12 of the General Statutes authorizing the Probate Court to grant a widow's allowance pending the settlement of her husband's estate is so independent of the Will, well established, and compelling, that it must prevail over any contrary intention expressed in the husband's Will. Accordingly, an attempt in his Will to interfere with the exercise of the Probate Court's discretion or the right of the widow to benefit of the allowance for support permitted to her by statute, or to require her to make an election between the benefits under his Will and the statutory allowance during the period of administration, is contrary to public policy and void." (Supra at Page 4).

In light of these decisions, it is clear that there is a strong public policy in Connecticut in favor of the widow's allowance, and that it will be denied only in the most unusual circumstances. The recently passed amendments to Section 45-250 of the Connecticut General Statutes, reaffirms the common law of the State, and demonstrate that the right of a widow's allowance is a vested right as of the moment of the death of the spouse, and is a right which can be defeated only in very rare and unusual circumstances.

As noted above, the lower court in Second National Bank of New Haven vs. United States, supra, held that the Connecticut law prior to 1961 was not sufficient to make widow's allowance deductible. However, at the time of the decision, the 1961 Amendment to Section 45-250 had been approved, and in Footnote 16 to that opinion, the court commented, in part, with

regard to 1961 Public Act No. 370, as follows:

> "This amendment clearly makes the widow's allowance in Connecticut eligible for the marital deduction." (222 F. Supp. at 451).

The Defendant argues that subsequent amendments to the Statute would change the opinion of the court quoted above. Such is not the case. The legislative history of the 1967 Amendment clearly shows that the purpose of the amendment was to make the widow's allowance vested so that it would qualify for the marital deduction. (Brief **Addendum** C. P 39).

The District Court relied upon Jackson vs. United States, 376 U.S. 503 (1964), in which the widow's allowance under California law was held not to be deductible. That case and the applicable California law, is clearly distinguishable from the Connecticut Statute in question here, and the facts of this case. In the Jackson case, a state court granted the widow an allowance payable monthly for a period not to exceed 24 months from the date of the husband's death. The widow survived the period without remarrying, and thus received the payments under state law. The application for the allowance to the state court was not made until 14 months after the husband's death. In that case, the court pointed out that the situation must be viewed as of the date of the decedent's death. "Both courts have held that the date of death of the Testator to be the correct point of time from which to judge the nature of a widow's allowance for the purpose of deciding

terminability and deductibility under Section 812 (e)(1)," (376 U.S. at 508, emphasis added). California law does not provide for vesting and nontermination of the widow's allowance by virtue of death or remarriage. Quite the contrary, is the Connecticut law.

However, it should also be pointed out, the deduction of the widow's allowance has been allowed under the laws of other states. In particular, the deduction has been allowed under the law of Michigan, Missouri and Illinois. Estate of Green vs. United States, 441 F. 2d. 303, (1971, Michigan); Bookwalter vs. Phelps, 325 F. 2d 186 (Missouri, 1963); Molner vs. United States, 175 F. Supp. 271 (Illinois, 1959).

In Estate of Green vs. United States, supra, the decision upholding the deductibility of the widow's allowance under Michigan law, the court analyzed the legislative history of Section 2056 of the Internal Revenue Code, and Michigan law in some detail, and concluded the widow's allowance was deductible, even though the Michigan case law was found not be be clear in its application of the Statute and its predecessors. However, the court found that there was a "strong predilection in favor of the widow and her allowance." (441 F. 2d. at 306). In that case, the Government argued that even if a widow's allowance is a vested right, and is not terminated by her death or remarriage, it should be held to be a "terminable interest" because the amount can only be fixed by the Probate

Court upon application, and after a determination as to the amount of the allowance. The Court held that the mere fact that a petition for an allowance had been filed, and that the Probate Court had to set the amount, did not destroy its deductibility. A similar conclusion was reached in Bookwalter vs. Phelps, supra., applying Missouri law. Although the court in Hamilton National Bank of Knoxville vs. United States, 353 F. 2d. 930 (1965) held that the widow's allowance under Tennessee law did not qualify for the marital deduction, the observation of the Court is particularly applicable here:

> "It has been uniformly held, the compensation qualifies for the marital deduction, and involing the necessary legal procedures to enforce the right is not a condition or contingency precedent to its existence. (Citations omitted).
>
> To hold that an interest is terminable only because legal procedures are invoked to enforce an interest which is otherwise vested at the date of the husband's death, is to hold that all elective rights such as the widow's allowance and the statutory interest in lieu of dower, are disqualified as marital deductions." (353F2d. at 932-933).

In addition, there have been a number of cases which have clearly distinguished the Jackson case. For example, in Hawaiian Trust Co. vs. United States, 412 Fed. 2d. 1313 (1969), the Court held that dower as provided under Hawaiian law was not a terminable interest and qualified for the marital deduction. Similarly, under Virginia law, the Court held that the widow's right to elect a statutory share against a Will was qualified for the marital deduction, and was not a terminable interest. First National Exchange Bank of Roanoke vs. United States, 335 Fed. 2d 91 (1964). Finally, in holding that widow's

allowance provided by Michigan law qualified for the marital deduction in Estate of Green vs. United States, supra, the Sixth Circuit analyzed the Jackson case at length, and found the Jackson case supported its determination in favor of the deductibility of the Michigan's widow's allowance. It should be noted, the Sixth Circuit also applied the Jackson case in determining that Tennessee widow's allowance did not qualify for the marital deduction. Hamilton National Bank of Knoxville vs. United States, supra.

Finally, the District Court also relied on Allen vs. United States, 359 F. 2d. 151, 154, Cert Den 385 U.S. 832 (1966). This case is inapplicable. In that case, the wife was given an option by the Will to elect one of two methods by which the husband's property would pass to her, and was to sign an agreement subject to the approval of the Surrogate's Court. The denial of the marital deduction as a terminable interest was upheld because the share passing to the wife depended upon voluntary acts and decisions made by the wife after the death of the Testator. In other words, the nature of the gift which she received depended upon her own decisions. Consequently, this case is inapplicable to the Connecticut widow's allowance. The right to such an allowance becomes vested upon the moment of death, subject only to application to the Probate Court for a determination as to the amount,

duration and method of payment. In the Allen case, the entire nature of the interest passing to the wife could be determined by the wife alone.

It is respectfully submitted that if the principles of the Jackson case were applied to the Connecticut statute, the widow's allowance in this case qualify for the marital deduction. The mere fact that an application for the allowance must be made to the Probate Court, and the mere fact that the Court has some legal discretion in the amounts to be awarded, does not defeat deductibility. Estate of Green vs. United States, supra; Hamilton National Bank of Knoxville vs. United States, supra F 932-933 (quoted above). This point was apparently conceded by the Government in its Brief before the Supreme Court in the Jackson case. (Brief quoted in Hawaiian Trust Company vs. United States, supra at 1314).

In other words, the procedural requirements are irrelevant on the question of vesting. As a result of the strong public policy in Connecticut in favor of the widow's allowance, and the directives of Section 45-250 of the Connecticut General Statutes, it is respectfully submitted that the right to a widow's allowance is vested as of the moment of the spouse's death, subject only to an application to the Probate Court for determination of the amount, method of payment, and time during which it is applicable. As set forth in the

order in this case, the amount is vested retroactive to the date of the decedent's death, and is not terminated by subsequent events, such as the death or remarriage of the widow. Thus, a complete interest in the property passes to the widow in the amount allowed by the Probate Court, and it is not subject to termination by any subsequent events. All of the necessary tests for deductibility under Section 2056 of the Internal Revenue Code are met. Consequently, it is respectfully submitted that the District Court erred in denying deductibility of the widow's allowance in this case. The mere fact of procedural requirements should not be allowed to defeat the deduction. As pointed out by the Supreme Court in another context, the marital deduction statute should not be construed so as to impose on warranted restrictions on the deductions. See: Northeastern Pennsylvania National Bank and Trust Company vs. United States, 387, U.S. 213, 221 (1967).

CONCLUSION:

It is respectfully submitted that the charitable deduction and the marital deduction as claimed by the Plaintiffs should be allowed, and that the decision of the District Court should be reversed. The Will of Frank H. James clearly mandates the preservation of his Estate for the benefit of the charitable remaindermen, subject

only to limited provisions to provide for the care and support of his widow and brother. At all material times, the Testator was aware of the limited needs of his widow and brother.

It is clear from all of the facts and circumstances, that the language of the Will, coupled with the total limitations for invasion of the corpus of the trust, on an annual and lifetime basis, set forth a definite, objective, clear and ascertainable standard. Once having passed this threshold test, it is then clear that the possibility of invasion by the income beneficiaries is so remote as to be negligible. The District Court erred in not considering that question. The uncontroverted evidence in this case shows that the income beneficiaries have substantial assets in their own right, have not taken the income which is granted to them by the Will, and there is no possibility of any volitional act on their part, or on the part of the Trustees, which will effect the amount the charities will receive more than the original amount as the result of accumulated income. Thus, the charitable deduction should be allowed.

Similarly, the widow's allowance, as a vested right under Connecticut law clearly qualifies for the marital deduction. The mere fact of procedural requirements and the determination by the Probate Court of the amount, method of

payment, and term for the allowance, is not sufficient to defeat deductibility.

For the reasons set forth above, it is respectfully submitted that the District Court erred in disallowing the deductions, and the Plaintiffs request an order reversing the decision of the District Court.

Respectfully submitted,

THE PLAINTIFFS - APPELLANTS

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of this Brief has been made on opposing Counsel by mailing four (4) copies to Scott P. Crampton, Assistant Attorney General, Tax Division, Attention of Joseph Liegl, United States Department of Justice, Washington, D. C., by depositing copies of the same in the United States Mails, postage prepaid as indicated above.

Frank W. Murphy, Attorney for the Plaintiffs - Appellants

A D D E N D U M "A"

A. SECTION 45-250 OF THE CONNECTICUT GENERAL STATUTES:

"Allowance for support of surviving spouse and family. Family car.

(a) The Court of Probate may allow out of any real or personal estate of a deceased person in settlement before such Court such amount as it may judge necessary for the support of the surviving spouse or family of the deceased during the settlement of the Estate.

(b) In making such allowance, the Court may in its discretion include in its decree ordering such allowance any one or more of the following provisions, to the extent that they are not mutually inconsistent:

(1) A provision that such allowance shall run (A) for the entire period the Estate is in settlement, or (B) for a fixed period of time not to exceed the period of settlement, in which case such allowance shall be subject to renewal by the Court in its discretion;

(2) A provision that such allowance is to be paid in a lump sum;

(3) A provision that such an allowance is to be made for a surviving spouse shall vest in such spouse retroactively as of the moment of death of his spouse so that it will be a fixed sum certain as of said date of death and shall not terminate with the subsequent death or remarriage of the surviving spouse, such allowance to be the absolute property of the surviving spouse, or, if deceased, of the Estate of such surviving spouse, without restriction as to use, encumbrance or disposition and for the purpose of this section, the right to seek such a vested allowance shall be a vested right as of the date of death of the deceased spouse, and

(4) A provision that such allowance shall be charged ultimately in whole or in part against any right the surviving spouse or other family member for whom an allowance is ordered may have to the income of the estate earned during the period of settlement. (c) The Court may also allow for the use during the settlement of the estate by such surviving spouse or family of any motor vehicle maintained by the decedent during his lifetime as a family car. (1961, P.A. 370; 1963; Section 1; 1967, P.A. 130.)"

A D D E N D U M "B"

B. AMENDMENTS TO SECTION 45-250:

" 1. 1961 Amendment:

1961 Public Act 370 inserted sentences beginning 'The right to support' and 'Any amount for support'.

2. 1963 Amendment:

1963 Public Act 309, Section 1, designated the first sentence as subsec. (a), deleted the two sentences inserted by 1961 Public Act 370 providing for the vesting of the right to support in the surviving spouse, and that the amount for support allowed such spouse shall become the absolute property of such spouse, added subsec. (b), and designated the second sentence of section as enacted as subsec. (c).

1963 P.A. 309, Section 2, provided: 'This act (amending this section) shall take effect July 1, 1963, and shall be applicable to all decrees of a Probate Court authorizing an allowance for the support of the surviving spouse or family of a deceased person made on or after such date, without regard to the date of death of such deceased person, but nothing herein shall be deemed to apply to any decree authorizing such an allowance made prior to the effective date of this act.'

3. 1967 Amendment:

1967 Public Act 130 substituted, in subsec. (b) (3), the words 'retroactively as of the moment of' for 'upon the' following the words ' shall vest in such spouse', inserted the words 'so that it will be a fixed sum certain as of the date of death' following the words 'death of his spouse', and the words 'and for the purpose of this section . . . death of the deceased spouse' following the words 'encumbrance or disposition'."

A D D E N D U M "C"

C. LEGISLATIVE HISTORY OF 1967 AMENDMENT. (1967 PUBLIC ACT 130).

1. SENATE PROCEEDINGS. (May 2, 1967):

" Cal. No. 235. File No. 278 Senate Bill No. 1446. General Law. An Act concerning the Federal Deduction of Widows' Allowances.

SENATOR FAULISCO:

Mr. President, I move acceptance of the Committee's favorable report and passage of the bill. This will qualify the Widows' Allowances to deductions against the Federal Inheritance tax. Such an allowance made for a surviving spouse shall best be retroactively at the moment the Judge fixes the sum on the date of death. I think this is a more practically approach, and I think this meets with the approval of the people who process probate law and it was the feeling of the committee that this bill ought to pass.

THE CHAIR:

All those in favor of the committee's favorable report and passage of the bill indicate by saying, 'aye'. Opposed. The bill is passed." (Connecticut General Assembly, Senate Proceedings, 1967, Volume 12, Part 2 at 827).

2. HOUSE PROCEEDINGS. (May 9, 1967):

"THE CLERK:

Calendar No. 398. S.B. No. 1446. An Act concerning the Federal Deduction for Widows' Allowances. Favorable report of Committee on General Law. (File No. 278).

REP. O'NEILL - 7th:

I move acceptance of the J.C. favorable report and passage of the bill in concurrence with the Senate.

MR. SPEAKER:

Will you remark?

REP. O'NEILL - 7th:

The purpose of this bill is to qualify the Widows' Allowance as a deduction against the Federal Inheritance Tax. If it can be related back to the time of death it will

ADDENDUM "C" continued:

so qualify. The allowance made for a surviving spouse, under this bill, shall vest in the surviving spouse, retroactively as of the moment of his death, so that it will be a fixed amount on the date of death. This will aid the widow, give the state's trustees and executors more flexibility, and I move passage of the bill.

MR. SPEAKER:

Will you remark further? If not, the question is on acceptance of the committee's joint favorable report and passage of the bill in concurrence with the Senate. All those in favor say aye. Opposed? The bill is passed." (Connecticut General Assembly House Proceedings, 1967 Volume 12 Part 5 at 1858).

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-6060

CONNECTICUT NATIONAL BANK, A.D. SLAVITT,
and CHARLES SALESKY, Executors
of the Will of
Frank H. James, Deceased

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA

Defendant=Appellee

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, New York

That on the 11th day of June, 1976, deponent served the within Appellant's Brief and Appendix upon Scott P. Crampton, Assistant Attorney General, Tax Division United States Department of Justice, Appellate ~~XX~~ Section Washington, D.C. 20520

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 11th day of June 1976

Harold Silberzweig

HAROLD SILBERZWEIG
Notary Public State of New York
No. 30-8995450
Qualified in Nassau County
Commission Expires March 30, 1978